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SEPT 24, 98

U.S. DEPARTMENT OF COMMERCE
PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Tomy America, Inc.

Serial No. 74/607,594

G. Donald Weber, Jr. for Tomy America, Inc.

Susan J. Kastriner, Trademark Examining Attorney, Law
Office 107 (Thomas Lamone, Managing Attorney).

Before Hanak, Hairston and Chapman, Administrative
Trademark Judges.

Opinion by Hairston, Administrative Trademark Judge:

Tomy America, Inc. has filed an application to
register the mark "BIG FUN" for goods which were
subsequently identified as:

Toys for preschool or kindergarten age children,
namely, plush toys, remote or radio controlled
action toys which move and make sounds, push
or pull toys which move and make sounds,
battery operated action toys, spring actuated
action toys which move or make sounds, multiple
activity toys and building blocks, board games
and manipulative and jigsaw puzzles, ride-on
toys and picture and image making toys namely,

a toy comprising a board and light conducting pegs which connect therewith to form various pictures and a toy consisting of a carry case and two pages supported therein at an angle to one another such that the first page supports an image which is projected through the second page to enable the user to trace the image.¹

Registration has been finally refused under Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d), on the ground that applicant's mark, when applied to the identified goods, so resembles the previously registered mark BIG FUN SOUNDS for "children's illustrated storybooks combined with electronic sound-emitting devices, sold as units, for the purpose of enabling children to play sound effects and music corresponding to the contents of said books,"² as to be likely to cause confusion. Applicant and the Examining Attorney have filed briefs.

In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods. With respect to the goods, although the involved goods are different, the issue to be determined here is not whether the goods are likely to be confused, but rather whether there is a likelihood that the public will be misled into the belief

¹ Application Serial No. 74/607,594 filed December 6, 1994, alleging a bona fide intention to use the mark in commerce.

² Registration No. 1,903,555 issued July 4, 1995.

that they emanate from the same source. Thus, goods need not be identical or even competitive in nature to support a finding of likelihood of confusion. It is sufficient for the purpose that the goods are related in some way and/or that the circumstances surrounding their marketing are such that they would be likely to be encountered by the same persons under circumstances that could give rise, because of the marks used thereon, to the mistaken belief that they originate from or are in some way associated with the same producer. *Chemical New York Corp. v. Conmar Form Systems, Inc.*, 1 USPQ2d 1139, 1143 (TTAB 1986).

In the present case, we find that applicant's toys for preschool and kindergarten age children and registrant's children's illustrated storybooks combined with electronic sound-emitting devices, sold as units are related goods. These products, which are designed to entertain and educate young children, are normally sold in toy stores and the toy department of retail stores. Also, the purchasers of these goods are the same, namely adults and children. See *Questor Corp. v. Dan Robbins & Associates, Inc.*, 199 USPQ 358 (TTAB 1978), *aff'd* 599 F.2d 1009, 202 USPQ 100 (CCPA 1979) [toys and children's books are related goods]. While adults may well be the primary purchasers of these kinds of goods, it does not follow that adults will exercise more

than ordinary care in purchasing the goods, particularly in view of the relatively low cost of these kinds of goods.

In addition, the Examining Attorney made of record several registrations which indicate that entities have registered a single mark for toys on the one hand, and children's books on the other. Such registrations serve to suggest that goods of the type involved in this appeal may emanate from a single source under the same mark. In re Mucky Duck Mustard Co., Inc., 6 USPQ2d 1467 (TTAB 1988).

Turning then to the marks, we find that the commercial impressions engendered by BIG FUN and BIG FUN SOUNDS to be sufficiently similar that when the marks are used in connection with related products, consumers are likely to be confused. Registrant's mark BIG FUN SOUNDS connotes that its children's illustrated storybooks produce sounds which are big fun. This is similar to the connotation of applicant's mark BIG FUN which is that the preschool and kindergarten age toys sold under its mark are big fun. In finding that the marks are similar, we have kept in mind the normal fallibility of human memory over time and the fact that the average consumer retains a general rather than a specific impression of trademarks encountered in the marketplace.

In sum, we find that consumers familiar with registrant's children's illustrated storybooks combined with electronic sound emitting-devices, sold as units, and sold under the mark BIG FUN SOUNDS would be likely to believe, upon encountering applicant's mark BIG FUN for preschool and kindergarten age toys, that the toys originated with or were somehow associated with or sponsored by the same entity.

Decision: The refusal to register is affirmed.

E. W. Hanak

P. T. Hairston

B. A. Chapman
Administrative Trademark
Judges, Trademark Trial and
Appeal Board

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